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No. _____

SUPREME COURT OF THE UNITED STATES
October Term, 1995

JOHN HALEY
PETITIONER

VS.

UNITED STATES OF AMERICA
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE EIGHTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. DOES THE FEDERAL JUDICIARY HAVE THE AUTHORITY TO REVIEW THE UNITED STATES ATTORNEY GENERAL'S DECISION UNDER 28 U.S.C. § 594(e) TO REFER JURISDICTION TO THE OFFICE OF THE INDEPENDENT COUNSEL?

2. DOES THIS COURT'S DECISION IN *MORRISON V. OLSON* REQUIRE THAT THE INDEPENDENT COUNSEL'S REFERRAL JURISDICTION AS SET FORTH IN 28 U.S.C. § 594(e) BE "DEMONSTRABLY RELATED" TO THE CIRCUMSTANCES GIVING RISE TO HIS APPOINTMENT.

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APPENDICES:

Petitioner John Haley adopts the Appendices contained in the Petition for Certiorari of Jim Guy Tucker, previously filed with this Court. The Petitions for Certiorari of both Messrs. Haley and Tucker arise from the same decision of the Eighth Circuit Court of Appeals.

TABLE OF AUTHORITIES

CASES:

Heckler v. Chaney, 470 U.S. 821 (1985) 8

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John Haley respectfully petitions this Court to issue a Writ of Certiorari to review the judgment of the Eighth Circuit Court of Appeals.

OPINIONS

The opinion of the Eighth Circuit Court of Appeals is reported at 78 F.3d 1313 (8th Cir. 1995). The opinion of the Eighth Circuit Court of Appeals denying rehearing has not yet been reported. The opinion of the District Court is reported 898 F.Supp.

654 (E.D. Ark. 1995).

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was rendered on March 15, 1996. A timely petition for Rehearing was filed by the Petitioner. Such Petition for Rehearing was denied on May 6, 1996. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

28 U.S.C. § 591 *et. seq.* (See Appendices of Jim Guy Tucker which have been adopted by Mr. Haley).

STATEMENT OF THE CASE

The jurisdiction of the District Court was invoked pursuant to 18 U.S.C. § 3231.

This Petition concerns the investigation and subsequent indictment of Petitioner John Haley, Governor Jim Guy Tucker, and William Marks by Independent Counsel Kenneth Starr. The Petitioner challenges the jurisdiction of the Independent Counsel to investigate persons and events unrelated to the circumstances giving rise to his appointment. Further, Petitioner submits that because oversight by the courts provides the sole protection against an unprincipled prosecutor, judicial review of the referral jurisdiction is both appropriate and

necessary.

Mr. Kenneth Starr was appointed Independent Counsel by the Special Division of the District of Columbia Court of Appeals on August 4, 1994. The statute under which he was appointed provides for an Independent Counsel to investigate and prosecute "certain covered persons" so high in Government or in the party controlling the White House that no ordinary Attorney General could be expected to prosecute without there being a conflict of interest. 28 U.S.C. § 591 *et seq.*

In the present circumstances, the United States Attorney General invoked the statute,

> ...because investigation by the Department of Justice of the allegations of violations of criminal law by McDougal and other individuals associated with President and Mrs. Clinton in connection with Madison Guaranty..., Whitewater Development Corporation, and Capital Management Services, Inc., would present a political conflict of interest...

This application led to the Order of August 4, 1994, designating Mr. Starr as Independent Counsel, and defining the basis of his authority:

> ...to investigate to the maximum extent authorized by the Independent Counsel Reauthorization Act of 1994 whether any individuals or entities have committed a violation of any federal criminal

> law...relating in any way to James B. McDougal's, President William Jefferson Clinton's, or Mrs. Hillary Rodham Clinton's relationships with Madison Guaranty Savings and Loan Association, Whitewater Development Corporation, or Capital Management Services, Inc.

To summarize, the original Order defined Mr. Starr's jurisdiction as the relationships which existed between the President and three corporations, Madison, Whitewater, and Capital Management ("CMS").

On Wednesday, August 31, 1994 Mr. Starr wrote to the Attorney General and asked for authority to investigate the Texas bankruptcy of Landowners Management Systems, Inc. The Assistant Attorney General responded, granting this expansion to "matters related" on Friday, September 2, 1994, apparently by return mail. This referral was made pursuant to 28 U.S.C. § 594(e), which allows an Independent Counsel to accept a matter "if the matter relates to the Independent Counsel's prosecutorial jurisdiction."

Independent Counsel did, in December, 1994, seek an order from the Special Division granting him the same "matter related" jurisdiction and in December, 1994, an order was entered granting his request. The statute provides that only "matters related" to the original grant of jurisdiction may be referred. 28 U.S.C. § 594(e).

Following the Independent Counsel's investigation, a three count indictment was returned by the Grand Jury on June 7, 1995. Counts I and II charged that Gov.

Tucker and Mr. Marks misrepresented ownership and authority over CMS. Count III, which indicts Petitioner Mr. Haley, charges that in 1987 Tucker, Marks and Haley were involved in the purchase of a cable television system which resulted in an alleged conspiracy to defraud the government. There was no claim, and no inference, that President Clinton, or any other high official of the federal Government, was involved.

On or about September 5, 1995, the District Court quashed the three count indictment against Haley, Tucker and Marks on the basis that the Independent Counsel had exceeded his jurisdictional mandate. The Independent Counsel appealed the decision to the Eighth Circuit Court of Appeals, which reversed the District Court and reissued the indictment. Subsequently, the Eighth Circuit denied Petitioner's Petition for Rehearing.

REASONS FOR GRANTING THE PETITION

The profound impact of the Ethics in Government Act on the highest levels of the federal government (and in the matter at bar, the state government, given the indictment and subsequent conviction of the standing Governor of Arkansas, Jim Guy Tucker in another matter), renders the present circumstances a matter of exceptional importance. Since its enactment, the Independent Counsel Act has spawned a lengthy list of targets, including: the investigation of White House Chief of Staff Hamilton Jordan and White House Staffer Timothy Kraft (Carter Administration); Secretary of Labor Raymond Donovan, White House Counselor Edwin Meece III, Assistant Attorney General Theodore Olson, White House Aid Michael Deaver, numerous executive officials

for their involvement in the Iran Contra matter, Lynn Nofzinger and HUD Secretary Samuel Pierce Jr., (Reagan Administration); and Secretary of State James Baker and other State Department Aides (Bush Administration). In addition, President Clinton's term has witnessed the appointment of two independent counsels, one to investigate Secretary of Agriculture Mike Espy and a second to investigate President Clinton and the first lady. As this lengthy list of high ranking federal officials makes clear, the interpretation and utilization of the Independent Counsel Act is necessarily a matter of significant importance based upon its effect on the very tenets of governmental authority. The justification for passage of the Act, to investigate possible violations of the law by high officials in the executive department whom otherwise could not be effectively investigated by the United States Attorney General, lends further credence to the fact that this is a matter of fundamental national concern. *See* Ethics in Government Act of 1978, as amended by the Independent Counsel Reauthorization Act of 1994, 28 U.S.C. §§ 591-599.

At risk is the encroachment of the very principles of liberty and freedom upon which the United States was founded. The Independent Counsel himself, responding to a question from the Eighth Circuit at oral argument regarding the means of controlling a derelict or runaway Attorney General, confirmed that it was his "position that [referral jurisdiction] is not subject to judicial review." It shocks the conscience to hear a person possessing unlimited resources and the power to prosecute demand that his efforts be free from judicial scrutiny.

In addition to the profound impact of the Act on

the current and three previous administrations, perhaps most significant is the Independent Counsel's very existence as a separate governmental entity. As envisioned by the Independent Counsel, his office operates as de facto fourth branch of government, immune to the checks and balances crafted by our forefathers as the cornerstone of the republic form of government. Justice Scalia pondered the dangers of an unchecked prosecutor in his dissent in *Morrison v. Olson*, 487 U.S. 654 (1988), stating "[b]ut even if it were entirely evident that unfairness was in fact the result--the judges hostile to the administration, the independent counsel an old foe of the President, the staff refugees from the recently defeated administration--*there would be no one accountable to the public to whom the blame could be assigned.*" *Id.* at 731.

I. THE PROVISIONS OF THE ETHICS IN GOVERNMENT ACT AND THE INDEPENDENT COUNSEL REAUTHORIZATION ACT OF 1994 DO NOT PRECLUDE JUDICIAL REVIEW OF AN INDEPENDENT COUNSEL'S EXERCISE OF JURISDICTION

The Eighth Circuit's decision to reissue the indictment, which is premised in large measure on its interpretation that the legislative history from the Independent Counsel Reauthorization Act of 1987 contemplates a complete and resolute restriction on the potential of judicial review, is contrary to Congress' actual intent. That portion of the legislative history upon which the Eighth Circuit relies, the conference agreement, was drafted in large measure in response to two Court of Appeals decisions: *Dellums v. Smith*, 797 F.2d 817 (9th Cir.

1986) and *Banzhaf v. Smith*, 737 F.2d 1176 (D.C. Cir. 1984). *See* H.R. Conf. Rep. No. 452, 100th Cong., 1st Sess. 22 (1987), *reprinted in* 1987 U.S.C.C.A.N. 2185, 2188.

Contrary to the Eighth Circuit's decision, a careful review of the *Dellums* and *Banzhaf* (the conference agreement inaccurately identifies the appellant as *Banzhai*) decisions, in conjunction with conscientious consideration of the language incorporated into the legislative history, reveals that Congress did not intend to eliminate judicial review of substantive constitutional challenges. Critical to such analysis is a review of the facts in both the *Dellums* and *Banzhaf* decisions, which were limited solely to attempts by *private* citizens to compel the Attorney General to institute an investigation pursuant to the Independent Counsel Act. In denying such requests, both the Court of Appeals for the Ninth Circuit in *Dellums* and the District of Columbia in *Banzhaf* indicated the Act does not provide for private causes of action. In the present matter, the challenged conduct involves the criminal investigation of individual citizens by a government entity acting beyond the scope of judicial oversight and with unlimited resources.

Further, each case involved a determination by the attorney general *not* to institute an investigation. This distinction between a decision not to undertake any action under the Act, as compared to the government's determination to launch a criminal investigation, which by its very nature affects a citizen's liberty and property rights, is profound. In *Heckler v. Chaney*, 470 U.S. 821 (1985) this Court recognized the distinction as follows,

> when an agency refuses to act it does not

> generally exercise its *coercive* power over an individual's liberty or property rights, and thus does not infringe upon areas that courts often are called upon to protect. Similarly, when an agency *does* act to enforce, that action itself provides a focus for judicial review, inasmuch as the agency must have exercised its power in some manner. The action at least can be reviewed to determine whether the agency exceeded its statutory powers.

Id. at 832. This distinction between passivity and activity is particularly relevant to the present matter as the component of legislative history citing the two decisions is limited exclusively to the conclusion that a decision *not* to initiate action is free from judicial review.

The obvious consequence of a prosecutor operating unfettered by judicial constraint is the profound danger of the overreaching of jurisdictional authority. Eliminating judicial review eliminates any mechanism for taming a renegade prosecutor; an eventuality certainly not contemplated by Congress. Such danger is compounded in the present situation where the Independent Counsel enjoys a limitless, federally funded budget while the persons he targets are individual citizens. The following excerpt from District Court's opinion bears repeating; "I cannot accept the proposition that a citizen can be put on trial in my Court for the loss of his liberty and that no Court has the power to determine whether there is jurisdiction to proceed in the matter." *United States v. Tucker*, 989 F.Supp. 654, 658 (E.D. Ark. 1995).

Further, this Court's decision in *Morrison* upholding the constitutionality of the Ethics in Government Act against challenges that it violated the Appointments Clause of the Constitution was premised in large measure upon the following facts: (a) the Independent Counsel is restricted to the scope of his jurisdictional mandate regarding "certain federal officials suspected of certain serious crimes;" and (b) the Independent Counsel is a temporary officer "appointed essentially to accomplish a single task." *Id.* at 672. In the present matter, with respect to item (a) the Independent Counsel's extra-jurisdictional investigations, which are beyond the scope of his referral jurisdiction (see Section II, *infra*), are inconsistent with the *Morrison* decision. Furthermore, the present Independent Counsel has not limited his inquiry to a single task. Instead, a plethora of individuals and entities from the Whitewater land development, to Texas bankruptcies, White House Travel Office personnel, and most recently, production of FBI files to the Clinton White House, have been subjected to the Independent Counsel's deep-pocketed investigations. In sum, the very constitutionality of the Independent Counsel is called into question given the present circumstances and the apparent conflict with the *Morrison* decision.

II.

AS THIS COURT CLEARLY ARTICULATED IN *MORRISON V. OLSON*, THE REFERRAL PROVISIONS OF THE ETHICS IN GOVERNMENT ACT AS THEY APPLY TO THE INDEPENDENT COUNSEL REQUIRE THAT MATTERS WHICH ARE REFERRED TO INDEPENDENT COUNSEL MUST BE DEMONSTRABLY RELATED TO THE CIRCUMSTANCES GIVING RISE TO HIS APPOINTMENT.

The relevant portion of the Ethics in Government Act, 28 U.S.C., § 591 *et seq* ((the "Act") West 1993 & Supp. 1995) concerning referral of related matters is found in 28 U.S.C. § 594(e) (West 1993 & Supp. 1995). The statute provides, in pertinent part, that:

> An Independent Counsel may ask the Attorney General or the division of the court to refer to the Independent Counsel *matters related to the Independent Counsel's prosecutorial jurisdiction*, and the Attorney General or the division of the court, as the case may be, may refer such matters. (Emphasis added).

This language is plain; only matters which are "related" may be referred. The natural corollary to § 594(e) requires that matters which are not "related" may not be referred. The Eighth Circuit placed great emphasis on the proposition that the lack of meaningful standards by which to interpret the word "related" extinguished any benefit in

undertaking such effort. However, despite such conclusion that no "meaningful standards" exist and any effort at definition is futile, the term "related" has in fact been interpreted by this Court with respect to the statute at issue. In *Morrison v. Olson*, 487 U.S. 654 (1988), this Court held, in interpreting the statute, that the jurisdiction "must be demonstrably related to the factual circumstances" that gave rise to the appointment. *Id.* at 679. This "demonstrable relationship" requirement was further discussed by the D.C. District Court in *U.S. v. Secord*, 725 F.Supp. 563 (D.D.C. 1989) as follows:

> The Supreme Court in *Morrison* called for more than a relationship between events which are stretched far over time and factually suspect. The relationship must be "demonstrable", that is, something which is evident initially and without great leaps of logic.

Id. at 567.

The necessity of the "demonstrably related" standard is firmly underscored in the present action where the Independent Counsel himself has conceded that there is no connection between the facts alleged in the indictment and the Clintons, McDougal and Capital Management Services, Inc. The Independent Counsel has admiitted that,

> Although the facts do not link Defendants to a specific relationship among CMS, the Clintons, or James B. McDougal, the Attorney General reasonably concluded that

> the LMS [Landowners Management System, subject of Count III of the indictment] matter was 'related to the Independent Counsel's prosecutorial jurisdiction'...

Response of the United States to Defendants' Motion to Dismiss Indictment for Lack of Jurisdiction, p.38 (R.257-309).

Clearly, the *Morrison* Court's decision to uphold the constitutionality of the Independent Counsel was premised on a limited jurisdictional mandate. The Court reasoned that "we do not think that Congress may give the Division *unlimited* discretion to determine the Independent Counsel's jurisdiction." *Morrison* at 679 (emphasis added). This Court further noted that:

> We emphasize, nevertheless, that the Special Division has *no* authority to take any action or undertake any duties that are not authorized by the Act. The gradual expansion of the authority of the Special Division might in another context be a bureaucratic success story, but it would be one that would have serious constitutional ramifications.

Morrison, at 682.

Thus, the clear and unequivocal language of this Court dictates that the Ethics in Government Act is constitutional only so long as it is limited in its application.

The clear language of the statute and the holding in *Morrison* dictate a narrowly tailored relationship requirement between the grant of jurisdiction and the independent counsel's investigation.

The Eighth Circuit interprets the language of the *Morrison* decision as restricting only the "authority of the Special Division to define jurisdiction in the first instance, and was the result of the constitutional concerns (appointments clause and separation of powers) generated by Congress's decision to vest executive powers in the judiciary (the Special Division)." Opinion at 15. However, such logic is inconsistent given the procedural framework for the independent counsel's exercise of authority. Because the independent counsel may only exercise its powers subsequent to a grant of jurisdiction by the Special Division, the two entities are necessarily related for purposes of the constitutionality of their actions. Surely the Supreme Court did not intend the conclusion that the Special Division was subject to a jurisdictional limitation to those matters "demonstrably related," while the Special Division's sole enforcement arm, the independent counsel, was free from the direct language of the statute which requires relatedness.

CONCLUSION.

In conclusion, it is clear that the very existence of the Independent Counsel as an entity designed to investigate and prosecute high level federal officials renders this matter appropriate for review by this Court. Further, and no less important, the issues presented by this appeal involve profound questions of constitutional notions of separation of powers and individual liberty.

Finally, this Court's decision in *Morrison v. Olson* requires a demonstrable relationship between the Independent Counsel's jurisdiction and the factual circumstances giving rise to his appointment.

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